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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 369

MORITZ BROKER,

Petitioner,

and

PASQUALE MAISIELLO, JOHN MAISIELLO, HENRY WEGNER, S. BRUKIRER and P. M. TRANSFER CO., INC.,

Defendants,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	8
Conclusion	21
Appendix A	1b
Appendix B	6b

CASES

Alabama Packing Co. v. *United States*, 5 Cir., 167 F. 2d 179 20

Babb v. *United States*, 5 Cir., 218 F. 2d 538 ..... 17, 19, 21

Griffin v. *Griffin*, 327 U. S. 220 9

Gung You v. *Nagle*, 9 Cir., 34 F. 2d 848 12

In re Murchison, 349 U. S. 133 9

Keck v. *United States*, 172 U. S. 434 ..... 17, 18, 19, 20

Steiner v. *United States*, 9 Cir., 229 F. 2d 745, cert. den. 352 U. S. 860 ..... 17, 19, 21

Sutten v. *United States*, 5 Cir., 157 F. 2d 661 20

United States v. *Cameron*, 15 Fed. 794 10

United States v. *Debrow*, 346 U. S. 374 8

United States v. *Hofmann*, 24 F. Supp. 847 ..... 10, 16

PAGE

United States v. *Josephson*, 2 Cir., 165 F. 2d 82, cert. den. 333 U. S. 838 8

United States v. *Legowitch*, 318 U. S. 702 8

United States v. *Wilder*, 14 Fed. 393 9

Young Bark Yau v. *United States*, 9 Cir., 33 F. 2d 236 11

CONSTITUTIONAL PROVISIONS

U. S. Const., Amend. V 9, 16

STATUTES

---

18 U. S. C. § 371 3

18 U. S. C. § 542 ..... 3, 19

18 U. S. C. § 545 ..... 3, 17-18, 19

19 U. S. C. § 1484 19

19 U. S. C. § 1485 19

RULES

Rule 15, F. R. Cr. Pro. 9, 15

IN THE

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MORITZ BROKER, *Petitioner,* and PASQUALE MAISIELLO, JOHN MAISIELLO, HENRY WEGNER, S. BRUKIRER AND P. M. TRANSFER CO., INC., *Defendants,* *against* UNITED STATES OF AMERICA, *Respondent.*	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 16, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in Appendix A hereto (*infra*, pp. 1b-4b).

JURISDICTION

The judgment of the United States Court of Appeals, sought to be reviewed, was dated and entered on July 16, 1957, and is printed in Appendix A hereto (*infra*, p. 5b). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Was petitioner in a criminal proceeding deprived of a fair trial and his rights under the due process clause of the Fifth Amendment, when the prosecution produced at the trial a witness whom it had transported from Germany and who testified as to alleged statements made to him in Germany by another defendant and an alleged co-conspirator, one S. Brukirer, which testimony incriminated petitioner, and which petitioner was unable to rebut by reason of the alleged co-conspirator's absence from this country and the previous denial of petitioner's motion to take the deposition of said alleged co-conspirator in Germany on written interrogatories, the answers to which petitioner claimed would tend to establish his innocence.

2. Did the second count set forth in the indictment sufficiently charge an offense under the laws of the United States?

STATUTES INVOLVED

The constitutional and statutory provisions involved are the Fifth Amendment to the Constitution of the United States; Rule 15 of the Federal Rules of Criminal Procedure; 18 U. S. C. § 371, 62 Stat. 701; 18 U. S. C. § 542, 62 Stat.

715 as amended 69 Stat. 242; 18 U. S. C. § 545, 62 Stat. 716 as amended 68 Stat. 782, 68 Stat. 1141, 69 Stat. 242; 19 U. S. C. § 1484, 46 Stat. 722 as amended 52 Stat. 1083, 67 Stat. 509, 517; 19 U. S. C. § 1485, 46 Stat. 724, as amended 52 Stat. 1083. The pertinent provisions thereof are printed in Appendix B hereto (*infra*, pp. 6b-16b).

STATEMENT

Petitioner was convicted in the District Court of each of three counts of an indictment (99a-I*), which charged (8a-11a-I) all the defendants named therein with (a) violating Section 542 of Title 18, U. S. C., by entering and introducing, and attempting to enter and introduce into the commerce of the United States, watch movements by means of a false statement; (b) violating Section 545 of Title 18, U. S. C., by receiving, concealing and facilitating the transportation and concealment of said watch movements after importation, knowing them to have been imported and brought into the United States contrary to law; and (c) violating Section 371 of Title 18, U. S. C., by conspiring with each other since May 1954 to commit offenses against the United States, to wit, smuggling into the United States watch movements and cameras which should have been invoiced, and receiving, concealing and facilitating the transportation and concealment of watch movements and cameras after importation, knowing the same to have been brought into the United States contrary to law.

Before the trial commenced, all the other defendants, except petitioner and S. Brukirer, withdrew their previous pleas of not guilty and pleaded guilty to the third count of

*Unless otherwise indicated, the numbers in parentheses refer to the pages in the Appendices printed for the Court of Appeals. "I" denotes appellant's appendix and "II" denotes respondent's appendix in that Court. The numbers in brackets refer to the original papers on file constituting the Record on Appeal.

the indictment (4a-I). Defendants Wegner and the Maisiello's, who were brothers, testified for the prosecution during the trial. They each received sentence of six months (5a-I). The indictment was severed as to defendant S. Brukirer, he being in Germany at the time of trial [1112]. The trial took place before Hon. Skelly J. Wright, U. S. D. J., on August 6, 8, 9, 10, 13, 14 and 15, 1956 (4a-5a-I). The jury deliberated approximately twelve hours, before bringing back a verdict of guilty (93a-98a-I). Petitioner was sentenced to serve the maximum permissible term on each count, to-wit, two years on count one and five years each on counts two and three (99a-I). The district court directed that the sentences run concurrently with each other (99a-I).

The indictment herein was filed on April 18, 1956, and petitioner was arrested on the same day (1a-I). Sometime in the middle of May, petitioner's trial counsel was informed by the Assistant United States Attorney in charge that a German customs agent would be brought here to testify at the trial for the purpose of establishing that Brukirer had been questioned by him in Germany and asked to whom he was shipping certain watch movements (which were the subject of the indictment) which had been seized in Germany and that Brukirer replied that he was shipping them to petitioner or to a company belonging to petitioner (21a-I). The defense thereupon began to make inquiries as to what the facts were and had difficulty in making direct contact with Brukirer (21a-I). However, in the early part of July (23a-I) trial counsel for petitioner learned that subsequent to the time the first statement was allegedly made by Brukirer he was again questioned by the German authorities, at which time Brukirer denied that he was shipping the watch movements to petitioner (23a-I) and also stated that petitioner was not involved in the shipment (25a-I), and that Brukirer was willing to so swear (25a-I).

As soon as this information was received, a motion was made (12a-13a-I) for an order directing the issuance of a commission to take the deposition of Brukirer on written interrogatories pursuant to Rule 15 of the Federal Rules of Criminal Procedure.

The papers in support of the motion were filed on July 13, 1956 (3a-I). In view of the reluctance of the prosecution to accept short notice, the motion itself did not come on for hearing until July 23, 1956 (30a-I). On the argument, the motion was opposed principally on the grounds, first, that it was not timely, and second, that there was no affidavit from Brukirer indicating his willingness to have his deposition taken (33a-I).

Insofar as timeliness is concerned, the principal contention made was that on June 18, 1956 the case was assigned for trial on July 23, 1956 or as soon thereafter as it could be heard (16a-I) and that the granting of the motion would upset these arrangements.

The Court indicated on the argument that it would deny the motion (31a-I), but that it would also consider a renewal of the argument if additional facts were brought to its attention which warranted that procedure (33a-I). Immediately thereafter and in order to obviate the second contention advanced by the Government that there was nothing from Brukirer to indicate that he would consent to giving his deposition, a cablegram was sent to Brukirer asking him that question, and an affirmative reply was received (34a-I).

These facts were presented to the Court on July 26, 1956 (33a-I). During the course of the presentation, the Assistant United States Attorney in charge stated that another attorney had asked him "if there was a possibility of a delay or an adjournment because Mr. Broker had come to his office and wanted to have him substituted as the attorney and had offered him a fee, and I had told him that I would

not consent to any adjournment at this time" (38a-I). This conversation was injected into the argument because it "goes against the statement" in petitioner's moving affidavit "that he is not financially able to take oral depositions in Germany instead of written interrogatories if this motion was ever decided in his favor" (39a-I). The Court thereupon stated on the record to petitioner's counsel (39a-I):

> "That puts a different color on the whole case. I was about to grant your motion."

The Court directed the Assistant United States Attorney in charge to file an affidavit as to the conversation, and denied the motion with the comment that petitioner was "trifling with the Court" (41a-I). The affidavit actually filed by the Assistant United States Attorney in charge (42a-I) did not contain any averment whatsoever with respect to his statement that petitioner had offered a fee to the other attorney.

In subsequent affidavits submitted by both petitioner and his trial counsel, it appeared that all petitioner had done, with the permission of his then counsel (39a-40a-I), was to ask another attorney if he would consider entering the case, either to assist petitioner's then counsel, or the latter to assist him, that the other attorney advised petitioner that he was planning a vacation and would not consider entering the case unless the trial could be adjourned, and that no fee arrangements of any kind had been discussed (45a-47a-I).

At the trial Heinrich Lamping, the German Custom agent who was brought to the United States from Germany, was called by the prosecution, as one of its principal witnesses (57a-I). Lamping testified that in December 1955 he seized two boxes of watches in Bremen, Germany, belonging to S. Brukirer (58a-I), that Brukirer came to see him from Munich in an effort to get the seizure suspended

(59a-I), that he told Brukirer that he, Lamping, suspected that Brukirer was the purchaser of the watches in Switzerland, and intended to smuggle them into Germany (60a-I), that Brukirer told him that was nonsense and that the "watches were destined to go to America" (60a-I), that Lamping noticed that Brukirer "in some way hemmed and that there was something which kept him from telling me that story, and he tried to convince me that this had nothing to do with the German Customs and that I should release the watches" (60a-I), that Lamping told him that he must have the truth (60a-I), whereupon Brukirer asked Lamping if he was under an obligation to inform American Customs to which Lamping stated "No, I am not so obligated" (60a-I).

Lamping also testified that Brukirer then told him that these watches were intended to be smuggled to the United States as tripods and that "he had these instructions from his broker, Mr. Semrhib, as to what he should do in Germany" (61a-I), whereupon Lamping stated that he would release the cases on the condition they be shipped to the United States (61a-I), and that Brukirer was very happy about it (62a-I). At the trial Lamping also testified that he found out that Broker and Semhrib were the same person (63a-I), that Brukirer told him that Semhrib was the purchaser of the watches (71a-I), that Brukirer "was only the executive organ of Mr. Semhrib" (75a-I), and that Brukirer had told him that "Semrib had visited in Germany about a month ago and saw him [Brukirer] in Munich and asked him to please attend to this matter just as a favor" (75a-I). It was established at the trial that petitioner was never in Germany during that period and in fact had not been in Europe subsequent to the year 1953 [833a].

On appeal the principal contention made on behalf of petitioner was that he was denied a fair opportunity to present his defense by reason of the denial by the District

Court of his motion to take the deposition of S. Brukirer. The Court of Appeals in rejecting this contention said (215a-216a - H):

> "The motion was not made until the eve of trial, three months after Brukirer had been named as a coconspirator and more than two months after the appellant had been apprised by the Government that it would offer a witness who would testify that Brukirer had made statements incriminating the appellant. No satisfactory explanation of this delay was given. Nor was there any showing that Brukirer's answers, if taken, would tend to exonerate the appellant. The circumstances were such as strongly to suggest that the motion was only a dilatory tactic, as the judge apparently thought. Under Rule 15 the judge had discretion to rule on the motion. We think here he made sound use of that discretion. *Heflin* v. *United States*, 5 Cir., 223 F. 2d 371."

With respect to the second question presented on this petition for a writ of certiorari, a motion had been made in the District Court to dismiss the second count of the indictment on the ground that it failed to state an offense which was denied (3a-I). On appeal to the Court of Appeals this ruling was affirmed without extended discussion, the court citing *United States* v. *Debrow*, 346 U. S. 374, 376; *United States* v. *Lepowitch*, 318 U. S. 702, 704 and *United States* v. *Josephson*, 2 Cir., 165 F. 2d 82, 85, cert. den. 333 U. S. 838 in support of its conclusion.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals, in sanctioning the denial by the District Court of petitioner's motion to take the deposition of Brukirer on written interrogatories, has, it is respectfully submitted, decided a federal question, i.e.,

whether or not petitioner had been accorded due process of law, in a way which is in conflict with applicable principles enunciated by this court and others, and in so doing has departed from the accepted and usual course of judicial proceedings.

This tribunal has said that "Due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially alter a defendant's rights." (*Griffin* v. *Griffin*, 327 U. S. 220, 231) and that "A fair trial in a fair tribunal is a basic requirement of due process" (*In re Murchison*, 349 U. S. 133, 137). It is respectfully submitted that the denial of petitioner's motion to take the deposition of Brukirer deprived him of a fair opportunity to present his defense and thus violated his rights under the due process clause of the Fifth Amendment.

Rule 15(a) of the Federal Rules of Criminal Procedure authorizes the Court "at any time" to grant a motion to take the testimony of a witness if (a) it appears that he may be unable to attend, (b) the testimony is "material", and (c) the taking of the deposition is "necessary to prevent a failure of justice". We submit that each of these conditions was complied with in the instant case. Brukirer being a German resident as well as a co-defendant was obviously disabled from attending. That Brukirer's testimony was material can hardly be doubted. It was sought not only to establish that petitioner was not involved in the alleged smuggling operations, but also to establish that a prior statement allegedly made by Brukirer to a German customs officer which implicated petitioner on each of the counts of the indictment, was not true. Nor can it be urged that it was not necessary to take his deposition to prevent a failure of justice.

Thus, in *United States* v. *Wilder*, 14 Fed. 393, the defendant was charged with smuggling. He applied for the issuance of a commission to take the depositions of

witnesses beyond the United States who were material to his defense. In granting the motion, the Court said (p. 393):

> "It is so abhorrent to all ideas of justice that a person charged with crime shall not have full opportunity to make his defense by witnesses, that although I am not prepared to hold that evidence taken as proposed in this case will be admitted on the trial, I am of the opinion that the commission and opportunity prayed for ought to be granted."

In *United States* v. *Hofmann*, 24 F. Supp. 847, the late Judge Hulbert granted a motion in a criminal case to take the deposition of a witness without the United States on defendant's application. In commenting upon the contention that there was no power to grant the motion, the Court said (p. 848):

> "The contention that this Court is without power to enable the defendant to secure evidence abroad by proper methods is abhorrent to American instincts. 'It may suit the purpose of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.'
>
> "Amendment 5 to the Constitution of the United States, U. S. C. A. Const. Amend. 5, guarantees that no person shall be deprived of his life, liberty or property without due process of law, and Amendment 6, U. S. C. A. Const. Amend. 6, insures a defendant's right 'to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.'
>
> "Compulsory process does not ordinarily extend beyond the boundaries of the United States but the excerpts of the Constitutional Amendments, above referred to, reflect the attitude of its Framers toward the preservation of personal liberties."

In *United States* v. *Cameron*, 15 Fed. 794, the Court granted a motion of defendant to take the deposition of

witnesses residing "hundreds of miles from the place of trial". In answering a contention made in opposition to the motion, the Court said (p. 798):

> "It is insisted that this construction of the statute will enable defendants in criminal cases to manufacture evidence by taking depositions of accomplices and others, who will swear falsely; but the danger in this direction is little, if any, greater than that which would exist if the witnesses were all produced in court, for the government can always cross-examine, and its attorney can readily ascertain, the reputation for truth and veracity of witnesses examined, and, if it is bad, can show it to be so upon the trial. On the other hand, if depositions cannot be taken, the danger of doing injustice to defendants in some cases would be very great indeed. The life or liberty of a party accused may depend upon the testimony of a witness thousands of miles away from the place of trial, and whose presence there cannot be procured * * *."

In *Young Bark Yau* v. *United States*, 9 Cir., 33 F. 2d 236, the Court reversed an order of deportation, when it appeared that the lower Court refused to permit defendant to take the depositions of four witnesses in China, one of whom was his mother who, it was alleged, would establish defendant's citizenship, and whose presence in this country could not be obtained. The Court said (p. 237):

> "It was averred that each of these four witnesses, if present in court, would testify of their own personal knowledge that the appellant was born in the Hawaiian Islands. This showing was in no wise controverted by the government. In fact, the government only interposed a demurrer to the application, thus admitting the facts. An American citizen, threatened with deportation because of alienage, has at least as much right to take depositions to establish his status as has any other litigant in a court of

> justice where civil rights are involved, and we are constrained to hold that the court below abused its discretion, and that the refusal to grant the application was prejudical error."

In commenting upon this decision, the Ninth Circuit in *Gung You* v. *Nagle*, 34 F. 2d 848, said (p. 851):

> "The refusal to hear competent witnesses or competent testimony available is a denial of due process of law, as we held in a recent case refusing to permit the taking of a deposition in such cases."

The Court of Appeals in sanctioning the denial of the motion by the District Court relied on two grounds (1) that the motion was not timely and (2) there was no showing that Brukirer's answers would exonerate petitioner.

With respect to the first ground the Court of Appeals pointed out that the motion was not made until three months after Brukirer had been named as a conspirator and more than two months after petitioner, through his counsel, had been apprised of the fact that the Government would offer a witness who would testify that Brukirer had made statements incriminating petitioner and that no satisfactory explanation of the delay was given. In the first instance, we respectfully submit that these time intervals are not at all substantial; but on the contrary, are relatively short. No one can dispute the fact that in numerous criminal prosecutions, the time interval between the filing of an indictment and the actual trial is substantially longer than that which took place in the instant case. The only possible consequence of the granting of the motion would have been a short adjournment in the actual trial. There was no showing and no claim by the prosecution that any one in the least perceptible degree would have been harmed thereby. We respectfully submit that if a short adjournment would have afforded petitioner an opportunity to obtain evidence estab-

lishing his innocence, and if no one was harmed by such adjournment, no court ought sanction a denial of that opportunity on the ground that there had been an alleged delay of some two months before any action was taken to procure that evidence.

As noted above, the Court of Appeals also stated in its opinion that no explanation had been given for the alleged delay. We respectfully submit that the learned Court's conclusion in this respect was erroneous. Thus, on the argument of the motion before the District Court, petitioner's counsel made the following statement (36a-37a-1):

> "Some time in the middle of May I spoke with Mr Jaffe [the Assistant United States Attorney in charge], and he hinted that Brukirer had made damaging statements in Europe, without any additional information. At a subsequent conference with Mr. Jaffe the situation became a little more clear, and by the time the end of May arrived I already had the position that a customs agent—before that I just thought it was Brukirer—would be used as a witness here to set forth declarations made by Brukirer.
>
> As soon as I learned that I attempted through [1100] all means at my limited disposal to make an investigaiton in Germany and to find out two things: One, could we get Brukirer to come to the United States to testify? Two, could we get Brukirer to at least submit an affidavit in connection with a motion for interrogatories?
>
> We were unable—when I say "we", I include the defendant Broker—to get anything positive or affirmative from Brukirer. In the course of this investigation through channels outside of Brukirer I learned for the first time—I would like to pinpoint the date, if I can, exactly. Today is the 26th of July. That would be roughly about the 8th or 9th of July. I am not sure of the date. I learned that Brukirer had subsequently told the German Customs agents that he did not ship this to Broker, did not

> intend shipping this to Broker, and who his customer might be, his true customer might be, was in South American—that is the information I had—was something he was going to keep as his trade secret.
>
> He was then asked by the German Customs officers whether he would swear to that, and he replied yes. As soon as I learned that I began this motion for interrogatories."

Substantially, the same facts also appear in counsel's affidavit submitted on the motion (18a-19a-1). Under those circumstances, we respectfully submit that even if there was such a delay in making the motion as to warrant its denial on that ground, it was adequately explained, in view of the uncontradicted fact that the information upon which the motion was predicated was not available to petitioner's trial counsel prior to July 1956.

The second ground upon which the Court of Appeals relied in affirming the District Court's ruling was the conclusion that no showing had been made that Brukirer's answers would exonerate petitioner. It is respectfully submitted that the above quoted portion of counsel's argument, as well as his affidavit, make such a showing.

In the instant case the prosecution brought a witness at the expense of the government across the ocean to testify to a hearsay statement made to him by an alleged co-conspirator, which, in effect, proclaimed petitioner as being guilty of each of the counts in the indictment on which he was tried. Yet petitioner has been deprived of the opportunity of taking the deposition of the very same alleged co-conspirator notwithstanding the fact that a showing was made that that person was willing to give his deposition and to state that petitioner was not involved. We urge that such action offends the traditional concept of fair play which the due process clause of the Constitution grants to petitioner.

The learned District Court itself recognized the basic unfairness that was inherent in the entire situation when it questioned the Assistant United States Attorney as to why it was necessary for the prosecution to bring Lamping to this country to testify as to alleged admissions by a co-conspirator (27a-I). The answer was as follows (28a-I):

> "It gives the Court and the jury the beginning of the case, and it carries it through, and it also shows that, on an admission by a co-conspirator, in fact there was a conspiracy.
>
> As I understand, the defense is going to be that the name of Broker appears nowhere on the papers, and he doesn't know what this is all about, and it is a complete frame-up from beginning to end. The more people the better from the Government's viewpoint. It is harder to say that eight people are framing him than seven, and it is harder to say that two are framing him instead of one."

We respectfully submit that if it is better for the prosecution to have two witnesses instead of one, a defendant, at the very least, is entitled to have a similar opportunity. Petitioner was deprived of that opportunity by the learned Courts below in the instant case.

It must be remembered that it took the jury nearly twelve hours to reach a verdict (93a-I, 98a-I) and then only after the Court had instructed them that "absolute certainty cannot be expected" (94a-I) and that, if at all possible, it was desirable that a verdict should be reached (94a-95a-I).

We need not speculate on what the verdict would have been if the testimony of Brukirer was available at the trial. Suffice it to say that without it, and with the testimony of Lamping admitted, petitioner was deprived of a fair opportunity to present his defense. We respectfully submit that this was not only contrary to the mandate of Rule 15, but also violated petitioner's rights under the due process clause

of the Fifth Amendment of the Constitution of the United States of America.

We urge that the determinations made by the courts below are in conflict with basic principles of fairness inherent in a criminal prosecution which have been enunciated by this court and others, and that in making those determinations the learned courts below have departed from the accepted and usual course of judicial proceedings to such an extent as to call for an exercise of this court's power of supervision.

2. This Court has never to our knowledge passed upon the question as to the circumstances under which a defendant is entitled to take the deposition of a witness outside the United States in a criminal proceeding. It is respectfully submitted that this is an important question of federal law that should be settled by this Court. The Court of Appeals sustained the denial of the motion by the District Court as a matter of discretion, which it found the District Court had properly exercised. While it may be that cases may exist which justify the denial of an opportunity to a defendant to take the deposition of a witness in a foreign country in a criminal proceeding, it is believed that if such power does exist it should always be sparingly exercised. This is especially so since a defendant apparently has no right to obtain the testimony of a witness in a foreign country by compulsory process and yet it must be recognized that the due process clause of the Fifth Amendment requires that a defendant be given a fair opportunity to present his defense (*United States* v. *Hoffman*, 24 F. Supp. 847).

The Court of Appeals sanctioned the denial of the motion to take the deposition of Brukirer as a matter of discretion because it found that petitioner had not shown that Brukirer's testimony would exonerate him. Yet there

was an affidavit on file by petitioner's counsel (18a-19a-I) as well as the latter's statement to the District Court (36a-37a-I) which demonstrated that the learned Court of Appeals' conclusion was erroneous. The prosecution argued in its brief to the Court of Appeals as a ground for sustaining the denial of the motion in the District Court that an affidavit from Brukirer had not been obtained by petitioner. The Court of Appeals did not in its opinion set forth the reasons why it reached the conclusion that there was no showing that Brukirer's testimony would exonerate petitioner. Thus, it is impossible in the present state of this record for a defendant in a criminal proceeding to be certain of precisely what type of proof and the extent thereof that it is necessary to present to a District Court in order to permit him to take the deposition of a witness in a foreign country in a criminal proceeding. It is respectfully submitted that that is an important question of federal law in the administration of criminal proceedings which is not settled and should be settled by a pronouncement of this court for the guidance of both the bench and the bar.

3. In sustaining the denial of petitioner's motion in the District Court to dismiss the second count of the indictment on the ground of insufficiency, it is respectfully submitted that the learned Court of Appeals rendered a decision which is in conflict with a decision not only of this Court (*Keck v. United States*, 172 U. S. 434) but which is also in conflict with decisions rendered by the Court of Appeals for the Fifth Circuit (*Babb v. United States*, 218 F. 2d 538) and the Court of Appeals for the Ninth Circuit (*Steiner v. United States*, 229 F. 2d 745, cert. den. 352 U. S. 860).

The second count pleaded in the indictment purported to charge an offense under Section 545 of Title 18, U. S. C., which provides in part, as follows:

> "Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law * * *"

Count II of the indictment charged appellant with having

> "knowingly received, concealed and facilitated the transportation and concealment of merchandise, to wit, 4,488 watch movements, after importation knowing the said merchandise to have been imported and brought into the United States contrary to law; to wit, Title 18, United States Code, Sections 542 and 545, and Title 19, United States Code, Sections 1001, 1484 and 1485."

In *Keck* v. *United States, supra,* the Court held that the use of the words "contrary to law" without more was insufficient to charge an offense. In that case the crime charged was that defendant (172 U. S. at p. 437)

> "'did knowingly, wilfully and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia,' diamonds of a stated value, 'contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States.'"

The Court, in holding the indictment was insufficient, said (172 U. S. at p. 437):

> "As is apparent, the alleged offense averred in this count was charged substantially in the words of the statute. In the argument at bar counsel for the United States conceded the vagueness of the accusation thus made; and, tested by the principles laid down in *United States* v. *Carll,* 105 U. S. 611, 612

[26:1135]. *United States* v. *Hess*, 124 U. S. 483 [31:516], and *Evans* v. *United States*, 153 U. S. 584, 587 [38:830, 832], the count was clearly insufficient. The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words, 'contrary to law,' contained in the statute clearly relate to legal provisions not found in section 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise. The generic expression, 'import and bring into the United States,' did not convey the necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific statutory requirements. As said in the *Hess Case*, at page 486:

'The statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury.' "

Precisely the same result was reached in both *Steiner* v. *United States*, *supra*, and *Babb* v. *United States*, *supra*, where defendants were charged in the indictment with having violated Section 545 of Title 18, U. S. C., in practically identical language as in the instant case.

In the Court of Appeals, the prosecution attempted to distinguish the instant indictment from those in the *Keck*, *Steiner* and *Babb* cases, *supra*, on the ground that the instant indictment set forth the laws which the importation is alleged to have been contrary to, "to wit, Title 18, United States Code, Sections 542 and 545, and Title 19, United States Code, Sections 1001, 1484 and 1485". We respect-

fully submit that this did not cure the deficiency because a mere reference to statutes, does not plead facts; and facts are what have to be alleged to charge a crime. Thus, in *Sutten* v. *United States*, 5 Cir., 157 F. 2d 661, defendant was convicted upon an information charging him with unlawfully having in his possession ten thousand pounds of sugar, the same being a rationed commodity "in violation of Second Revised Ration Order No. 3 and General Ration Order No. 8, as amended". In holding that the information was insufficient as a matter of law because it failed to allege facts, the Court pointed out that the phrase above quoted (157 F. 2d at p. 664)

> "is not an allegation of fact, but a legal conclusion of the pleader; it constitutes no part of the description of the offense".

Accord: *Alabama Packing Co.* v. *United States*, 5 Cir., 167 F. 2d 179

Moreover an examination of the statutes which are claimed to constitute the laws under which the watches were alleged to have been imported contrary to, will show that they define numerous offenses and provide for numerous requirements. The prosecution might just as well have charged that the importations were in violation of Title 18, U. S. C., for all the help this furnished in apprising appellant of the charge. Certainly, no one could possibly contend that that would have been sufficient.

The Court of Appeals affirmed the denial of the motion to dismiss made by the District Court without extended discussion. The Court in its opinion did not discuss nor did it comment upon the cases hereinabove set forth. It is respectfully submitted that there is a conflict between the decision of the Court of Appeals in this case and the decision of this Court in the *Keck* case as well as the decisions

of the Courts of Appeal in the *Babb* and *Steiner* cases. That conflict can only be resolved by a determination of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JESSE CLIMENKO
Counsel for Petitioner

JESSE CLIMENKO
MARTIN I. SHELTON
of Counsel

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 340—October Term, 1956.

(Argued June 13-14, 1957 Decided July 16, 1957.)

Docket No. 24357

UNITED STATES OF AMERICA,

Appellee,

—v.—

MORITZ BROKER,

Defendant-Appellant,

—and—

PASQUALE MAISIELLO, JOHN MAISIELLO, HENRY WEGNER, S. BRUIKIRER and P. M. TRANSFER CO., INC.,

Defendants.

Before:

CLARK, *Chief Judge,*
CHASE and HINCKS, *Circuit Judges.*

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Wright, *J.*, and a jury, for smuggling merchandise into the United States, in violation of Title 18, United States Code, §§ 542 and 545. *Affirmed.*

JESSE CLIMENKO, of Gallop Climenko & Gould, New York, N. Y., *for appellant.*

JOHN T. MORAN, JR., Asst. United States Attorney, Southern District of New York, New York, N. Y. (Paul W. Williams, United States Attorney, and Arthur B. Kramer, Asst. U. S. Attorney, New York, N. Y., on the brief), *for appellee.*

PER CURIAM:

The jury found the appellant guilty on three counts: the first charging the introduction of watch movements into the United States by means of a false statement, in violation of 18 U. S. C. § 542; the second charging the receipt and concealment of the watch movements after importation into the United States "contrary to law," in violation of 18 U. S. C. § 545; and the third charging a conspiracy to commit the substantive crimes charged in the first two counts. Concurrent sentences were imposed; two years on Count 1 and five years each on Counts 2 and 3.

The appeal is principally based upon a denial by the trial judge of appellant's motion under Rule 15, Federal Rules of Criminal Procedure, to take in Germany by written interrogatories the deposition of one Brukirer—an alleged coconspirator and a named defendant. The motion was made not until the eve of trial; three months after Brukirer had been named as a coconspirator and more than two months after the appellant had been apprised by the Government that it would offer a witness who would testify that Brukirer had made statements incriminating the appellant. No satisfactory explanation of this delay was given. Nor was there any showing that Brukirer's answers, if taken, would tend to exonerate the appellant. The circumstances were such as strongly to suggest that the motion

was only a dilatory tactic, as the judge apparently thought. Under Rule 15 the judge had discretion to rule on the motion. We think that here he made sound use of that discretion. *Heflin* v. *United States*, 5 Cir., 223 F. 2d 371.

The appellant further claims that the offense charged in Count 1 was not proved. This count charged introduction into commerce "by means of a false statement contained in a form, entitled Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit." The proofs showed that this form was false in two respects: (a) in disclosing the packing cases covered by the form as containing tripods instead of watch movements, (b) in giving Canada instead of the United States as the destination. But Count 1 charged that the form was false as to contents: it did not charge falsity as to destination. The appellant insists that the only effective "means" for the attempted introduction into commerce in the United States was the false statement as to destination: that the alleged falsity as to contents was wholly immaterial to the perpetration of the crime.

Even so there was no deficiency of proof. As stated above, there was ample proof that the form, which constituted the "means" of the crime, was false as to destination as well as contents. Thus the real question posed relates not to the sufficiency of proof but the sufficiency of pleading. Was Count 1 fatally defective for its failure to allege falsity as to destination? We think not. It charged in the language of the statute that the means was a false form which was adequately identified as a "Transportation Entry and Manifest." That sufficiently defined the crime: it was not necessary to specify in just what respect the statement was false. *United States* v. *Debrow*, 346 U. S. 374, 376; *United States* v. *Lepowitch*, 318 U. S. 702, 704; *United States* v. *Josephson*, 2 Cir., 165 F. 2d 82, 85, cert. den. 333 U. S. 838.

The cases just cited also sustain the sufficiency of Count II against the appellant's attack. And his attack on the Government's summation rests on a petty point which was not saved below. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, ınd for the Second Circuit, held at the United States ırthouse in the City of New York, on the 16th day of ', one thousand nine hundred and fifty-seven.

sent:

HON. CHARLES E. CLARK,
Chief Judge

HON. HARRIE B. CHASE
HON. CARROLL C. HINCKS
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

MORITZ BROKER,
Defendant-Appellant

Appeal from the United States District Court for the ıthern District of New York.

This cause came on to be heard on the transcript of ord from the United States District Court for the South- District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, udged, and decreed that the judgment of said District trict Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B

STATUTES INVOLVED

U. S. CONST., AMEND V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 15, Federal Rules of Criminal Procedure

Rule 15. Depositions

(a) When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) Defendant's Counsel and Payment of Expenses. If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government. In that event the marshal shall make payment accordingly.

(d) How Taken. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by the subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a

deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

Title 18, United States Code, Section 371.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, Section 542.

§ 542. Entry of goods by means of false statements.

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the

truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or

Whoever is guilty of any willful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by any such act or omission—

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term "commerce of the United States", as used in this section, shall not include commerce with the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

Title 18, United States Code, Section 545.

§ 545. Smuggling goods into the United States.

Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed

evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

Title 19, United States Code, Section 1484:

§ 1484. Entry of merchandise—Requirement and time.

(a) Except as provided in sections 1490, 1498, 1552, and 1553 and in subdivision (j) of section 1336 of this title, and in subdivisions (h) and (i) of this section, the consignee of imported merchandise shall make entry therefor either in person or by an agent authorized by him in writing under such regulations as the Secretary of the Treasury may prescribe. Such entry shall be made at the customhouse within five days, exclusive of Sundays and holidays, after the entry of the importing vessel or report of the vehicle, or after the arrival at the port of destination in the case of merchandise transported in bond, unless the collector authorizes in writing a longer time.

(b) Production of certified invoice.

The Secretary of the Treasury shall provide by regulation for the production of a certified invoice with respect to such merchandise as he deems advisable and for the terms and conditions under which such merchandise may be permitted entry under the provisions of this section without the production of a certified invoice.

(c) Production of bill of lading.

The consignee shall produce the bill of lading at the time of making entry, except that—

(1) If the collector is satisfied that no bill of lading has been issued, the shipping receipt or other evidence satisfactory to the collector may be accepted in lieu thereof;

(2) The collector is authorized to permit entry and to release merchandise from customs custody without the production of the bill of lading if the person making such entry gives a bond satisfactory to the collector, in a sum equal to not less than one and one-half times the invoice value of the merchandise, to produce such bill of lading, to relieve the collector of all liability, to indemnify the collector against loss, to defend every action brought upon a claim for loss or damage, by reason of such release from customs custody or a failure to produce such bill of lading and to entitle any person injured by reason of such release from customs custody to sue on such bond in his own name, without making the collector a party thereto. Any person so injured by such release may sue on such bond to recover any damages so sustained by him; and

(3) The provisions of this subdivision shall not apply in the case of an entry under subdivision (h) or (i) of this section (relating to entry on carrier's certificate and on duplicate bill of lading, respectively).

(d) Signing and contents.

Such entry shall be signed by the consignee, or his agent, and shall set forth such facts in regard to the importation as the Secretary of the Treasury may require for the purpose of assessing duties and to secure a proper examination, inspection, appraisement, and liquidation, and shall be accompanied by such invoices, bills of lading, certificates,

and documents as are required by law and regulations promulgated thereunder.

(e) Statistical enumeration.

The Secretary of the Treasury, the Secretary of Commerce, and the Chairman of the United States Tariff Commission are authorized and directed to establish from time to time for statistical purposes an enumeration of articles in such detail as in their judgment may be necessary, comprehending all merchandise imported into the United States, and as a part of the entry there shall be attached thereto or included therein an accurate statement specifying, in terms of such detailed enumeration, the kinds and quantities of all merchandise imported and the value of the total quantity of each kind of article.

(f) Packages included.

If any of the certificates or documents necessary to make entry of any part of merchandise arriving on one vessel or vehicle and consigned to one consignee have not arrived, such part may be entered subsequently and notation of the packages or cases to be omitted from the original entry shall be made thereon. One or more packages arriving on one vessel or vehicle addressed for delivery to one person and imported in another package containing packages addressed for delivery to other persons may be separately entered, under such rules and regulations as the Secretary of the Treasury may prescribe. All other merchandise arriving on one vessel or vehicle and consigned to one consignee shall be included in one entry, unless the Secretary of the Treasury shall authorize the inclusion of portions of such merchandise in separate entries under such rules and regulations as he may prescribe; except that, in the case of articles not subject to a quantitative or tariff-rate quota, entry for the entire quantity covered by an entry for immediate transportation made under section

1552 of this title may be accepted at the port of entry designated by the consignee, or his agent, in such entry after the arrival of any part of such quantity at such designated port or at such other place of deposit as may be authorized in accordance with regulations prescribed by the Secretary of the Treasury.

(g) Statement of Cost of Production.

Under such regulations as the Secretary of the Treasury may prescribe, the collector or the appraiser may require a verified statement from the manufacturer or producer showing the cost of production of the imported merchandise, when necessary to the appraisement of such merchandise.

(h) Entry on Carrier's certificate.

Any person certified by the carrier bringing the merchandise to the port at which entry is to be made to be the owner or consignee of the merchandise, or an agent of such owner or consignee, may make entry thereof, either in person or by an authorized agent in the manner and subject to the requirements prescribed in this section (or in regulations promulgated hereunder) in the case of a consignee within the meaning of paragraph (1) of section 1483.

(i) Entry on duplicate bill of lading.

Any person may, upon the production of a duplicate bill of lading signed or certified to be genuine by the carrier bringing the merchandise to the port at which entry is to be made, make entry for the merchandise in respect of which such bill of lading is issued, in the manner and subject to the requirements prescribed in this section (or in regulations promulgated hereunder) in the case of a consignee within the meaning of paragraph (1) of section 1483, except that such person shall make such entry in his own name.

(j) Release of merchandise.

Merchandise shall be released from customs custody only to or upon the order of the carrier by whom the merchandise is brought to the port at which entry is made, except that merchandise in a bonded warehouse shall be released from customs custody only to or upon the order of the proprietor of the warehouse. The collector shall return to the person making entry the bill of lading (if any is produced) with a notation thereon to the effect that entry for such merchandise has been made. The collector shall not be liable to ~~any~~ person in respect of the delivery of merchandise released from customs custody in accordance with the provisions of this section. Where a recovery is had in any suit or proceeding against a collector on account of the release of merchandise from customs custody, in the performance of his official duty, and the court certifies that there was probable cause for such release by the collector, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector, but the amount so recovered shall, upon final judgment, be paid out of moneys appropriated from the Treasury for that purpose.

Title 19, United States Code, Section 1485.

§1485. Declaration—Requirement; Form and contents.

(a) Every consignee making an entry under the provisions of section 1484 of this title shall make and file therewith, in a form to be prescribed by the Secretary of the Treasury, a declaration under oath, stating—

(1) Whether the merchandise is imported in pursuance of a purchase or an agreement to purchase, or whether it is imported otherwise than in pursuance of a purchase or agreement to purchase;

(2) That the prices set forth in the invoice are true, in the case of merchandise purchased or agreed to be purchased; or in the case of merchandise secured otherwise than by purchase or agreement to purchase, that the statements in such invoice as to value or price are true to the best of his knowledge and belief;

(3) That all other statements in the invoice or other documents filed with the entry, or in the entry itself, are true and correct; and

(4) That he will produce at once to the collector any invoice, paper, letter, document, or information received showing that any such prices or statements are not true or correct.

(b) Books and Periodicals.

The Secretary of the Treasury is authorized to prescribe regulations for one declaration in the case of books, magazines, newspapers, and periodicals published and imported in successive parts, numbers, or volumes, and entitled to free entry.

(c) Agents.

In the event that an entry is made by an agent under the provisions of section 1484 of this title and such agent is not in possession of such declaration of the consignee, such agent shall give a bond to produce such declaration.

(d) Liability of consignee for increased duties.

A consignee shall not be liable for any additional or increased duties if (1) he declares at the time of entry that he is not the actual owner of the merchandise, (2) he furnishes the name and address of such owner, and (3) within ninety days from the date of entry he produces a

declaration of such owner conditioned that he will pay all additional and increased duties, under such regulations as the Secretary of the Treasury may prescribe. Such owner shall possess all the rights of a consignee.

(e) Separate forms for purchase and nonpurchase importations.

The Secretary of the Treasury shall prescribe separate forms for the declaration in the case of merchandise which is imported in pursuance of a purchase or agreement to purchase and merchandise which is imported otherwise than in pursuance of a purchase or agreement to purchase.

(f) Deceased or insolvent persons; partnerships and corporations.

Whenever such merchandise is consigned to a deceased person, or to an insolvent person who has assigned the same for the benefit of his creditors, the executor or administrator, or the assignee of such person or receiver or trustee in bankruptcy, shall be considered as the consignee; when consigned to a partnership the declaration of one of the partners only shall be required, and when consigned to a corporation such declaration may be made by any officer of such corporation. Whether the consignee is an individual, a partnership, or a corporation, the declaration may be made by any person who has knowledge of the facts and who is specifically authorized by such individual, a member of such partnership, or an officer of such corporation to make such declaration.